

IN THE MATTER OF LICENSE NO. 345372 MERCHANT MARINER'S DOCUMENT NO.
Z-415354-D2 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Curtis H. FAULK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1806

Curtis H. FAULK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 12 March 1969, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for four months outright plus two months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a Third Assistant Engineer on board SS SAN MATEO VICTORY under authority of the document and license above captioned, on or about 21 February 1966, Appellant, while the vessel was at Nha Be, RVN:

- 1) assaulted and battered the master of the vessel with his fists;
- 2) used foul and abusive language to the master;
- 3) assaulted and battered the second mate with his fist;
- 4) threaten the chief engineer with bodily harm;
- 5) created a disturbance aboard the vessel while in an intoxicated condition; and
- 6) absented himself from the vessel without leave.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of SAN MATEO VICTORY and the testimony of two witnesses taken by deposition on written interrogatories.

In defense, Appellant offered in evidence the testimony of one witness taken by deposition on written interrogatories and his own

testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of four months outright plus two months on twelve months' probation.

The entire decision was served on 19 March 1969. Appeal was timely filed on 7 April 1969 and perfected on 10 November 1969.

FINDINGS OF FACT

On 21 February 1966, Appellant was serving as a Third Assistant Engineer on board SS SAN MATEO VICTORY and acting under authority of his license and document while the ship was in the port of Nha Be, RVN.

At about 0230 on that date, the master of the vessel entered the officers' salon and found Appellant, intoxicated, interfering with military personnel in the performance of clerical duties. The master ordered Appellant to his room and escorted him there. In Appellant's room, Appellant, using foul and abusive language, assaulted and battered the master, who subdued Appellant by force. During the course of the struggle the master's clothes were torn. When Appellant promised to go to bed, the master left and went to his own quarters.

Shortly thereafter, the second mate, who was working cargo, saw Appellant take a fire ax and proceed toward the master's quarters declaring that he was going to "get" the "old man". Appellant did not in fact go to the master's quarters, but the second mate did, reporting Appellant's actions to the master. The master then took a pistol from his safe, and he and the second mate went to Appellant's room where they found Appellant sitting with the ax between his legs. Appellant was disarmed by the master. Appellant again reviled the master with foul and abusive language.

The master secured assistance from the military authorities ashore and set an armed guard at Appellant's door.

Later in the morning Appellant, clean and neatly dressed, who had apparently left his room through the port hole, approached the second mate who was on deck, and struck him on the left side of the jaw. Appellant then left the vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Examiner. Appellant makes six points.

I

There was error in admitting entries in SAN MATERO VICTORY's Official Log Book into evidence because they were not made in compliance with 46 U.S.C. 702.

II

This error requires dismissal of the specification alleging threats to do bodily harm to the chief engineer.

III

The specification dealing with absence from the vessel without authority should have been dismissed because Appellant had been discharged from service before he left the vessel.

IV

The findings are contrary to the weight of the evidence and are not supported by substantial evidence of a reliable and probative character.

V

There was undue delay between the conclusion of the hearing and the rendering of findings and service of the decision.

VI

In view of Appellant's prior lengthy good record the order is excessive.

APPEARANCE: Pressman and Scribner, New York, N.Y., by Joel Glanstein, Esq.

OPINION

I

Appellant's position on his first point is inconsistent with his position at the hearing. On appeal he urges that the log entries were inadmissible. At the hearing he acknowledged that they were admissible in evidence although he attacked their weight, as having been made without substantial compliance with 46 U.S.C. 702.

His position at the hearing was correct. Whether or not the entries are made in accordance with the statutes, they are admissible under the business entry rule.

On this appeal I need not analyze the complicated arguments proposed by Appellant and the complicated fact situation to determine whether there was substantial compliance with the statutes, because as to the specifications on which the Examiner's findings will be affirmed there is ample evidence independent of the log entries.

II

As to the threat to do bodily harm to the chief engineer, I am inclined to agree with Appellant that the specification should be dismissed, but not for the reason urged.

The threat was the subject of a part of the log entry. Assuming that the entry was made in substantial compliance with the statute, I do not think that as a factual statement it is sufficiently precise to support a finding that Appellant (in the words of the specification) "did wrongfully threaten the Chief Engineer with bodily harm". The relevant words are: ". . .Faulk did roam and verbally threaten the life of the Chief Engineer before witnesses, though this was through the Chief Engineer's port-hole". I do not believe that this constitutes an adequate statement of fact, and my doubts are increased by the deposed testimony of the second mate, the only witness to testify to the threat, that Appellant was ". . .telling everybody that he was going to kill the Captain, the Chief Engineer, the Second Mate."

This is not concrete enough to furnish substantial evidence that Appellant at some time and place actually threatened bodily harm to the Chief Engineer.

III

Appellant's primary argument under the point challenging the absence specification is that while Appellant was confined to his quarters, with a military guard posted in the passageway outside, the master wrote in the log, ". . .for the above offenses, and for the safety of the vessel and crew, Faulk shall be discharged from the vessel as of this date, 21 February 1966 for just cause". This, Appellant urges, constituted a discharge as of 0430 that morning and authorized his separation from his room, via the port hole, and from the vessel, later that morning.

I cannot accept that a statement of the master of an intention to discharge Appellant later that day, especially a statement

uncommunicated to Appellant (as Appellant is quick to point out in other connections), constituted actual discharge.

The character of Appellant's departure from the vessel is complicated by three factors:

- 1) he did report to the consulate;
- 2) he did receive medical attention; and
- 3) when he returned to the ship he was not permitted aboard.

I prefer not to consider all the complexities here. Appellant's absence from the vessel, charged merely as unauthorized absence, is a trivial matter in comparison with the other offenses found proved, and in view of the fact that the master wanted him off the ship anyway the "absence" specification should be dismissed, in the context of the facts of this case, as not worth litigation. This view of the matter, it is emphasized, is not in any way a precedent.

IV

Appellant's fourth point must be reduced to an argument cognizable in administrative law. Since the trier of facts is the judge of credibility and the assigner of weight to evidence, his findings cannot be against the weight of the evidence; hence his findings will not be disturbed unless it appears that they are not supported by substantial evidence.

The evidence upon which the Examiner relied here was eyewitness testimony of two persons, and a contemporaneously made record kept in the regular course of business. It is true that the testimony of those witnesses was taken by deposition on written interrogatories and that Appellant himself was the only witness to testify personally.

There is no mechanically applied rule that the testimony of a witness appearing personally is entitled to greater weight than that of one testifying by deposition. The witness who appears before an examiner personally is in a better position to impress the examiner with his reliability. He is also in the position of being subject to close scrutiny through cross-examination. When all evidence is in, there is opportunity in argument and summation to persuade an Examiner to give more credence to one group of witnesses over another group's evidence.

An Examiner is not required to set out in detail every instance of inconsistency or of inherent improbability which leads him to assign less weight to the testimony of one witness than to that of another. On appeal, the only question is whether the

evidence accepted by the examiner is so inherently unreliable that a reasonable man could not accept it. I cannot say, as a matter of law, that the evidence accepted by the Examiner on the specifications finally to be found proved in this case, and given greater weight than the opposing evidence, was so inherently unreliable that it should have been rejected.

V

Appellant's fifth point is a specific complaint that there was undue delay between the "conclusion" of the hearing on 30 April 1968 and the entering of findings on 31 January 1969 and service of the full decision on 14 March 1969.

This hearing commenced on 19 December 1966. It was not "concluded" on 30 April 1968; the taking of evidence and the hearing of argument were finished on 30 April 1968. There was a resumption of proceedings on the record on 31 January 1969, at which time the conclusions as to the specifications were announced. The full decision was served on 14 March 1969, with an amendment dated 18 March.

I admit that the delay from the closing of the record on the merits to the announcement of findings was unexplainedly long for a misconduct case involving the testimony of only four witnesses, but in assessing the effect of the delay, which Appellant calls attention to, I must look to the whole record.

Three significant facts are noteworthy. The chronology of the record shows that up to the time the investigating officer rested there were thirteen sessions of the hearing. Several of these were abortive because of the failure of Appellant's counsel to appear at all or because counsel had sent a substitute to appear who had no authority to act.

Then, although it must have been apparent to Appellant from the outset that he would want the testimony of the witness Wade, which would be expected to be available only on a deposition, appellant made no effort to obtain and perpetuate the testimony until after he had begun his defense. From this point on there were twelve more sessions of the hearing during ten of which Appellant's own counsel did not know where Appellant was or when he could be expected to appear (for the first time) to testify in his own behalf. The situation had reached the point at which an examiner could well have questioned the validity of the standing of a counsel who could not guarantee the appearance of his client.

These delays, it is noted, were solely for convenience of Appellant.

Possibly most important however is that from 30 April 1968 to 31 January 1969 there is no appearance that Appellant was pressing the Examiner for a decision. There was little reason for him to press for a decision which might be adverse to his interests. From the date of service of charges to the date of service of the decision, Appellant was free, and exercised his choice, to use his license and document to sail as a merchant mariner, except for the date of 18 April 1968, on which date he chose to make his only appearance before the Examiner. Then on 31 January 1969 Appellant's counsel appeared before the Examiner for announcement of the findings.

However I might be inclined to accept a protest as to the delay of nine months, I cannot accept one in this case in which Appellant did not seek early findings and in which Appellant's counsel did not even see fit to raise the question at the time of appearance on 31 January 1969 when the conclusions as to the specifications were announced. (I note here that during the pendency of this appeal Appellant has still been free to sail.)

VI

Appellant's sixth point is that the order is excessive.

The initial order of the Examiner was lenient under all the circumstances. The findings and conclusions as affirmed, despite dismissal of two specifications on appeal, justify approval of the lenient order.

CONCLUSION

The conclusions of the Examiner as to the alleged threat to the chief engineer and the alleged unauthorized absence from SAN MATEO VICTORY should be set aside because the findings in the first instance are not supported by substantial evidence and because in the second case the unauthorized absence, as charged, is too trivial to consider under the circumstances of the case.

ORDER

The findings of the Examiner are AFFIRMED, but only to the extent covered by my Findings of Fact above. The conclusions of the Examiner as to the alleged threat to the chief engineer of SAN MATEO VICTORY and the alleged unauthorized absence from that vessel are SET ASIDE. The findings and conclusions of the Examiner are otherwise AFFIRMED, and the order, as finally dated by the Examiner at New York, N. Y., on 18 March 1969, is AFFIRMED.

C. R. BENDER

Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 29th day of June 1970.

INDEX

Log entries

- Admissibility of
- Insufficient
- Regular course of business

Hearsay evidence

- Regular course of business, entries

Evidence

- Regular course of business, records
- Weight of, determined by Examiner
- Weight of, substantial

Log entries

- Regular course of business

Threats

- Against superior officer, offense of

Discharge

- Of officers, by Master

Absence from vessel

- Without authority, offense of

Defenses

- Discharge by officer

Hearings

- Delay explained

Order of Examiner

- Lenient